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VIA ELECTRONIC SUBMISSION

Marlene H. Dortch Secretary Federal Communications Commission 445 12th Street S.W. Washington, D.C. 20554

Re: Open Internet, GN Docket No. 14-28

Dear Ms. Dortch:

On May 8, 2014, Hank Hultquist, Gary Phillips, Christopher Heimann, and I, on behalf of AT&T, met separately with Daniel Alvarez, Legal Advisor to Chairman Wheeler, Priscilla Delgado Argeris, Legal Advisor to Commissioner Rosenworcel, Nick Degani, Legal Advisor to Commissioner Pai, and Amy Bender, Legal Advisor to Commissioner O'Reilly, to discuss how the Commission should proceed in response to the D.C. Circuit's vacatur and remand of the Commission's Open Internet rules in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). Consistent with our comments in this proceeding, we explained that, the court's decision requires only that the Commission fine-tune its prior rules insofar as they apply to fixed broadband by narrowly tailoring the nondiscrimination requirement to address only true threats to Internet openness and allowing ISPs to make individualized decisions whether and on what terms to deal with edge providers.¹

We noted in particular that calls for reclassification of broadband Internet access services as a Title II telecommunications service would cause risks and harms that dwarf any putative benefits, all but scuttle the administration's ambitious broadband agenda, and would not, in all events, preclude the paid prioritization arrangements that seem to be the singular focus of reclassification proponents.

As the FCC's *National Broadband Plan*² recognized, the nation's overriding communications policy objective for the 21st century is to promote universal broadband deployment and adoption. Private investment, not prescriptive regulation, is the key to achieving that goal. According to the *Plan*, "the American broadband ecosystem has evolved rapidly" over the past decade, and this evolution has been "[f]ueled primarily by private sector investment and innovation." Broadband providers are continuing to invest tens of billions of dollars each year

¹ AT&T Comments, GN Docket No. 14-28 (filed March 21, 2014).

² FCC, Connecting America: The National Broadband Plan (2010) (Broadband Plan).

³ *Id.* at XI.

in America's broadband future, creating thousands of new jobs. But achieving the next phase of broadband deployment envisioned by the *National Broadband Plan* will require more—according to the Commission's own estimates, \$350 billion more. The *National Broadband Plan* thus wisely endorsed "actions government should take to encourage more private innovation and investment," while emphasizing that "the role of government is and should remain limited."

When the Commission last considered reclassification proposals, industry analysts warned that such proposals, even when accompanied by forbearance and portrayed as "third way" alternatives to maximal dominant-carrier regulation, would create enormous investment-deterring regulatory uncertainty. For example:

- Craig Moffett of Bernstein Research observed, on the day the Commission proposed Title II reclassification, that: "Markets abhor uncertainty. *Today we got uncertainty in spades*." He added that "it is unclear what, precisely, this means for [other] information service providers, including Google"; that he "expect[ed] a *profoundly negative impact on capital investment*"; and that the "third way" was "an unequivocal negative development[.]"
- Jonathan Chaplin of Credit Suisse explained, also in the aftermath of the reclassification proposal, that "[t]he biggest disconnect between Washington and Wall Street is on how the competitiveness of the industry is viewed. . . . Competition is doing its job and regulations would make it very difficult for companies to get reasonable return on investment. . . . The threat of regulation could discourage investment and cost jobs[.]"⁷
- Mike McCormack of J.P. Morgan agreed that investors were "extremely nervous about what's coming" out of this proceeding, and added that "[b]roadband is a very competitive place so there's no point [in] fixing it[.]"
- Anna-Maria Kovacs of Regulatory Source Associates noted that it would "take years to know whether [any reclassification decision] is upheld in court.... [W]e would expect the industry—telco, wireless, and cable—to assess capital investments from this point in light of the potential for new and more extensive regulations."

⁶ Craig Moffett, *Quick Take-U.S. Telecommunications, U.S. Cable & Satellite Broadcasting: The FCC Goes Nuclear*, Bernstein Research, May 5, 2010 ("Moffett, Quick Take") (emphasis added).

⁴ Staff Presentation, *September 2009 Commission Meeting*, at 45 (Sept. 29, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf.

⁵ Broadband Plan at 5.

⁷ Yu-Ting Wang & Howard Buskirk, *Reclassification Said to Pose Broad Risk to U.S. Economy*, Communications Daily, at 1 (June 14, 2010) (some emphasis added and some omitted).

⁸ *Id.* (emphasis added).

⁹ Anna-Maria Kovacs, *Telecom Regulatory Note: D.C. Circuit vacates FCC's Comcast network-management order*, Regulatory Source Associates, LLC, at 2 (Apr. 7, 2010) (emphasis added).

- Stanford tech analyst Larry Downes claimed that a reclassification "would be the worst example in history of a tail wagging the dog" and perhaps "the worst idea in communications policy to emerge in the last 75 years—that is, since the [FCC] was first created in 1934." ¹⁰
- PC Magazine commentator and MarketWatch analyst John Dvorak described the proposed Title II reclassification as "the worst possible outcome" of the net neutrality debate and "a terrible idea" that would "destroy the Internet as we know it." ¹¹
- Former Chairman Michael Powell, then with Provident Equity Partners, "fear[ed] a prolonged period of uncertainty and instability" in the wake of any Title II reclassification decision that would "undermine the shared goal of intensifying our nation's investment in broadband." 12
- The Washington Post editorial page explained that any attempted reclassification under Title II would be "a *legal sleight of hand* that would amount to a *naked power grab*" and "could *damage innovation* in what has been a vibrant and rapidly evolving marketplace."¹³

A panel of financial experts held at New York University law school agreed with all of these concerns:

- Height Analytics Managing Director Tom Seitz warned that "the FCC could be inhibiting investment through its net neutrality and reclassifications investigations" because "[i]nvestors hate uncertainty and clearly what is being created right now is uncertainty in the marketplace[.]"
- Citigroup Managing Director Mike Rollins expressed concern that reclassification would open the door for "a later FCC to . . . limit the number of Title II provisions from which it will forbear[.]" This risk, he added, would have an investment impact today, because "[w]hen investors are looking at policy decisions they're not just looking at what the FCC wants to accomplish today but what those policies can do over time.
- Wise Harbor founder Keith Mallinson noted that "people are hungry to have more capabilities [in their broadband connections] and the market has the capability to deliver

¹⁰ Larry Downes, *What's in a title? For broadband, it's Oz vs. Kansas*, CNET News, Mar. 11, 2010, http://news.cnet.com/8301-1035_3-20000267-94.html ("Oz vs. Kansas") (emphasis added).

¹¹ John Dvorak, *Net neutrality becomes a dangerous issue*, MarketWatch, Apr. 16, 2010, http://www.marketwatch.com/story/print?guid=2012C86A-55C5-4CA0-821F-F203C21E2B6E (emphasis added).

¹² Michael K. Powell, *My Take on the Appeals Court Decision, Broadband for America*, Apr. 7, 2010, http://www.broadbandforamerica.com/blog/michael-powell-my-take-appeals-court-decision ("Powell, *My Take on the Appeals Court Decision*") (emphasis added).

¹³ Editorial, *Internet oversight is needed, but not in the form of FCC regulation*, Wash. Post, Apr. 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604610.html (emphasis added).

that, but increasing regulation has the risk of stifling that through the uncertainties but also by limiting some basic economic freedoms." ¹⁴

These concerns about the long-term investment deterring effects of regulatory uncertainty are, if anything, understated. First, by themselves, the threshold legal challenges to the Commission's reclassification decision could consume much of the next decade, depending on the number of judicial remands. The communications industry suffered through similar regulatory chaos following the Commission's effort in 1996 to shape the industry around the UNE-P model of intramodal "competition" for voice telephony services. That model ultimately succumbed to judicial challenges—but only eight years later, in 2004, after multiple and increasingly skeptical remands by the Supreme Court and the courts of appeals.

Second, quite apart from direct legal challenges to the Title II regime itself, any reclassification decision would ignite multi-year regulatory controversies on a variety of issues, including, what portions of Title II would and would not apply to Internet service providers, and which Internet services and service providers would be subject to Title II. Title II is a comprehensive regulatory framework put into place in 1934 to regulate monopoly telephone companies. Additional provisions were added over the years, including in 1996, with a spate of wholesale obligations applicable to telecommunications service providers. Title II reclassification would automatically trigger application of all these requirements to broadband Internet access services and Internet service providers.

To be sure, the Commission might attempt to minimize the disruption and calm the markets by proposing to forbear from most statutory provisions in Title II, as it did when it first proposed reclassification. But sorting through which of these provisions should apply and which would be subject to forbearance would itself ignite controversy, disagreement, and litigation, creating protracted regulatory uncertainty. And even if the Commission were to successfully exercise its forbearance authority, the new Title II regime would still be far more regulatory, and create far more regulatory uncertainty, than the pre-*Comcast* Title I regime – as the Commission itself recognized sixteen years ago in the *Stevens Report*. In that report, the Commission rejected a Title II classification for ISPs and, in the process, rejected claims that forbearance would eliminate the policy harms of such a classification. It explained:

Notwithstanding the possibility of forbearance, we are concerned that including Information service providers within the "telecommunications carrier" classification would effectively impose a presumption in favor of Title II regulation of such providers. Such a presumption would be inconsistent with the deregulatory and procompetitive goals of the 1996 Act. In addition, uncertainty about whether the Commission would forbear from applying specific provisions could chill innovation.

Stevens Report, 13 FCC Rcd at 11525, para. 47.

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¹⁴ Howard Buskirk, *Regulatory Uncertainty Created by FCC Seen Limiting Network Investment*, Communications Daily, July 15, 2010 ("Buskirk, *Regulatory Uncertainty*") (emphases added); see also John Curran, *Panelists: Neutrality, Title II Broadband Issues Breeding Investor Uncertainty*, TR Daily, July 14, 2010 ("Curran, *Panelists*")

Indeed, reclassification would raise a host of issues that reclassification proponents have completely ignored in their advocacy. For example, if broadband Internet access service is a telecommunications service, then broadband Internet access providers could be entitled to receive transport and termination fees under section 251(b)(5). The Commission could not avoid this occurrence by establishing a bill-and-keep regime because, unlike voice traffic, Internet traffic is asymmetric. And because Internet traffic would now be subject to reciprocal compensation, virtually every settlement free peering arrangement would have to be replaced by newly negotiated arrangements implementing the reciprocal compensation provisions of the Communications Act. Moreover, in those instances in which reciprocal compensation does not apply, ISPs would be entitled to file tariffs for the collection of charges for terminating Internet traffic to their customers.

Section 222 obligations would also kick in, imposing new obligations on a host of entities and causing wholesale disruption of current Internet business models. ISPs at both edges of the network, as well as transit providers, content delivery networks and others would appear to be statutorily required to take reasonable measures to prevent disclosure or use of information, such as IP addresses, websites visited, customer location information and other data, and they would be precluded from using this information without customer consent. Email providers and search engines, as telecommunications service providers in their own right, could likewise be subject to these requirements.

And on top of all this, entities classified as telecommunications service providers would have to assess Universal Service Fees on their customers. While the current 17% contribution factor would presumably be reduced, this would still amount to a substantial tax on Internet use.

Moreover, sections 201 and 202 would automatically apply once the Commission classified broadband Internet access services as telecommunications services. And since the flashpoint for this debate is "paid prioritization," it is unlikely that the Commission would forbear from applying either of these provisions. But both sections contain vague and self-executing prohibitions that could make Internet service providers liable for any conduct that some future Commission, bowing to the same types of political pressures and irrational hysteria that we now see, decides to deem unreasonable. ISPs would thus have to assess litigation risk whenever, among other things, they engage in new anti-piracy measures, network-management techniques, or commercial arrangements with particular applications and content providers. The uncertainty could deter such initiatives to the detriment of broadband providers, application and content providers, and ultimately consumers.

Beyond all this, any forbearance decision today could be prone to judicial challenge and attempted reversal by future Commissions. No issue would ever be settled, and the Internet ecosystem would be subject to a state of perpetual regulatory uncertainty. As Commissioner

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¹⁵ In its 2011 *USF/ICC Transformation Order*, the Commission held that all telecommunications traffic exchanged with a LEC is subject to section 251(b)(5) obligation to establish reciprocal compensation arrangements. *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, para. 769 (2011) (*USF/ICC Transformation Order*), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

McDowell has noted, this would hardly be the "environment needed to attract up to \$350 billion in private risk capital to build out America's broadband infrastructure." ¹⁶

In this regard, it is no means clear whether a decision now to forbear from particular Title II requirements could be reversed by this or a future Commission. Indeed, there have been a spate of petitions to overturn past Commission forbearance decisions, and the Commission has, conspicuously, declined to dismiss those petitions on the grounds that forbearance decisions are irreversible. Moreover, insofar as the Commission has forborne from applying Title II itself to Verizon's broadband transmission services, the Commission would have to reverse that very forbearance decision in order to resurrect Title II regulation of the connectivity component of a broadband Internet access service. This action, in itself, would be inconsistent with any purported assurance that forbearance decisions are not readily reversible.

Moreover, it is foolish to think that the Commission could reclassify the provision of broadband Internet access to consumers as a telecommunications service without similarly reclassifying a broad array of other functionally analogous services in the Internet ecosystem. For example, there is no logical or legally sustainable basis to distinguish between ISPs serving consumer "eyeballs" and those serving content and other edge providers. Likewise, transit providers and content delivery networks (CDNs) would be telecommunications service providers subject to Title II, as would connected device customers. (The latter would be resellers of telecommunications services and thus telecommunications service providers in their own right.) Indeed, the logic behind reclassification would dictate that when a search engine connects an advertising network to a search request or effectuates a connection between a search user and an advertiser, it too would be providing a telecommunications service. And so too would an email provider that transmits an email or a social network that enables a messaging or chat session. The point is, once the Commission separates transmission from information processing, there is no way logically to limit that rationale to one segment of the Internet and not others. Every entity that provides an over-the-top communications capability, whether it's voice, text, or video, becomes either a facilities-based provider or a reseller (or both) of a telecommunications service.

In this regard, any attempt to confine Title II reclassification to owners of last-mile transmission facilities would crash headlong into the statutory language, Supreme Court precedent, and 75 years of Title II jurisprudence. The classification of any provider as a Title II "common carrier" has never depended on whether the provider owns transmission facilities, let alone last-mile facilities. That is why standalone long-distance telephone companies, such as the legacy AT&T Corp., MCI, and Sprint, were always treated as Title II carriers even though they depended on local exchange carriers for their last-mile connectivity, and why even long-distance *resellers* are treated as Title II carriers even though they often own no facilities at all. Here, the retail service that ISPs offer to consumer and business users encompasses end-to-end access to all points on the Internet, even though each user's ISP must generally rely on other providers to supply some of the links to each of those points (for example, through peering and transit arrangements among Internet backbones).

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¹⁶ Commissioner Robert McDowell, "The Best Broadband Plan for America: First, Do No Harm," Free State Foundation Keynote Address, at 13 (Jan. 29, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296081A1.pdf.

The key legal rationales for any Title II reclassification decision would thus necessarily extend to any Internet provider that holds itself out to customers as *arranging* for the transmission of data from one point on the Internet to another, whether or not it *owns* transmission facilities. As discussed above, this category would extend to ISPs such as Earthlink and AOL that do not own last-mile transmission facilities; to content delivery networks ("CDNs") such as Akamai that hold themselves out to the commercial public as transporters of data to distant points on the Internet; to providers of e-readers like Amazon.com, which provides Internet access through the Kindle; to companies like Google that provide advertising-supported Internet search services and, on behalf of countless commercial customers, arrange for the transmission of advertising content to end users; and to a variety of other online transport providers ranging from Netflix to Level 3 to Vonage. In short, Title II reclassification would be a sledgehammer, not a scalpel.

The supreme irony here is that Title II reclassification would not even preclude the paid prioritization arrangements that are purportedly animating reclassification proposals. Title II does not require that all customers be treated the same as reclassification proponents seem to believe. Rather, by its express terms, Title II prohibits only "unjust and unreasonable" discrimination, and it is well established that Title II carriers may offer different pricing, different service quality, and different service quality guarantees to different customers so long as the terms offered are "generally available to similarly situated customers." For example, even telecommunications carriers considered "dominant" are permitted to negotiate contracts for special access services that include such preferential treatment as: (1) service level guarantees, (2) expedited and prioritized service installation and/or (3) expedited and prioritized repair. Such offerings may be individually negotiated with the customer, along with the other terms on which the service is made available, and need not be provided to all customers — only those customers who execute the same contract as the first customer or who are able to negotiate the same terms in the context of another contract. Indeed, telecommunications carriers are not even obligated under Title II to offer the same contract to every customer who might want it. Rather, the contract (including the service level guarantee or prioritized installation or repair) must only be made available to "similarly situated customers," and under well-established precedent, customers are not similarly situated if, among other things, they operate in different competitive environments or if the cost of serving them is higher than the cost of serving the first customer.

Nor does Title II require uniform pricing. For example, the Commission has allowed dominant carriers to make the following types of price distinctions for years:

- Volume discounts discounts that are available only to customers who commit to purchase services in larger volumes.
- Term discounts discounts available only to customers who commit to purchase services for specified terms, with longer term commitments commanding bigger discounts.
- Multiple service discounts discounts available only to customers who purchase multiple services.

• Competitive necessity discounts – discounts needed to respond to competition may be offered on a selective basis.

And it has provided nondominant carriers even broader latitude to negotiate individually tailored agreements regarding rates, terms and conditions. For example, the Commission has concluded that CMRS providers' grant of discriminatory concessions to consumers that haggle was reasonable, benefitted consumers, and thus consistent with section 202's non-discrimination clause.¹⁷

In short, reclassification of broadband Internet access services would impose a host of harms, including investment killing uncertainty, without doing anything to remedy the alleged "problem" (*i.e.*, paid prioritization) it purportedly is intended to address. Calls for reclassification are not well-thought out and should be promptly rejected.

Respectfully Submitted,

/s/ Robert W. Quinn, Jr.

cc:

Jonathan Sallet Daniel Alvarez Priscilla Delgado Argeris Nick Degani Amy Bender

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¹⁷ See Orloff v. Vodafone AirTouch Licenses LLC d/b/a Verizon Wireless, 17 FCC Rcd 8987 (2002), petition for Review Denied sub nom Orloff v. FCC, 352 F.3d 415 (D.C. Cir. 2003), cert. denied, 542 U.S. 937.